Alloy Consolidated Sdn Bhd & Anor v Anjari Properties Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–03–180 OF 2005
MOHD GHAZALI, SULONG MATJERAIE AND AHMAD MAAROP JJCA
10 FEBRUARY 2009

Civil Procedure — Pleadings — Defence — Amendment — Amendment to add counterclaim — Whether amendment to insert proposed counterclaim was statute-barred — Whether insertion of counterclaim would turn suit from one character into a suit of another and inconsistent character — Whether inordinate delay in filing of application to insert counterclaim showed that it was not bona fide — Limitation Act 1953 s 31

The first respondent was commissioned by the Jabatan Kerja Raya ('JKR') for the building and construction of four government projects ('the projects'). The second respondent was at all material times the executive chairman of the first respondent. As the first respondent was facing cash flow problems the second respondent approached one Dato' Dr Nik Hussain, the corporate representative of the first and second appellants ('the corporate representative'), for help. As a result of a series of meetings between the second representative and the corporate representative an agreement was reached whereby the second appellant agreed to takeover the first respondent's role in the projects and to be paid RM10,260,399.48 for the works it was to undertake. It was also agreed that the takeover would be fronted by the first appellant, a bumiputra company and that the first respondent would publicly remain as the contractor appointed for the projects. At the outset, the second respondent had already incurred liabilities from third party contractors and requested financial help from the appellants to settle these debts. With the knowledge and consent of the respondents the first appellant advanced a sum of RM1,200,000 to settle these debts. Thereafter the appellants incurred expenses of RM2,216,404.68 on the projects. Subsequently when the first respondent appointed contractors to replace the second appellant and/or the first appellant, it was the appellants' contention that the respondents had by their conduct repudiated the agreement between the first respondent and the appellants. Although the appellants accepted the repudiation and termination of the agreement they averred that the first respondent was to hold monies received from JKR ('the monies from JKR') for the benefit of the second and/or first appellant and that for these purposes the first respondent was a

constructive trustee of the appellants over the monies from JKR. When the respondents denied this claim the appellants instituted a civil suit against the respondents for an order that the first and second respondents jointly and severally pay general damages to them for repudiating the agreement. Alternatively the appellants prayed for an order that the respondents jointly and severally pay the sums advanced to the respondents by the appellants, ie, the sum of RM2,216,404.68 to the second respondent and the sum of RM1,200,000 to the first respondent. In their civil suit the appellants also averred, inter alia, that the second respondent had deceived the appellants by leading them to believe that monies from JKR would be paid to them. The first and second respondents filed separate statements of defence in which they denied liability. Essentially they denied the appellants were entitled to the monies from JKR or that the first respondent was a constructive trustee for these monies because there was no enforceable contract between the appellants and the first respondent; and that if there was a contract the appellants had by their conduct breached that contract. The appellants applied for summary judgment against the respondents for the sum of RM336,683.56 which they allegedly forwarded to the creditors of the first respondent who were involved in the projects and a further sum of RM2,216,404.68, being progress claims made to the first respondent on the projects. The High Court entered summary judgment against the respondents for part of the amount prayed for by the appellants in the application. At the hearing of the application for summary judgment the first respondent applied to amend its statement of defence by adding a counterclaim. Although this application to amend was at first dismissed, on appeal the first respondent was allowed to amend its statement of defence to include the counterclaim. This was the appellants appeal against this decision ('the first appeal'). Subsequently the second respondent also applied to amend his statement of defence to include a similar counterclaim and this application was also allowed. The appellants also appealed against this decision ('the second appeal').

This judgment concerned both these appeals. At the hearing of the first appeal the appellants had submitted that the first respondent's proposed counterclaim was a new cause of action and that the counterclaim arose out of a cause of action that was time-barred and was therefore statute barred. The appellants' grounds of appeal, in the first appeal were that the judge had erroneously allowed the amendment to insert the time-barred proposed counterclaim and that the inordinate delay in the filing of the application to insert the counterclaim showed that it was not bona fide but filed as a tactical manoeuvre against the appellants. In reply the first respondent submitted that the counterclaim arose from the same factual matrix as the defence that was filed and that it was not statute-barred. In the second appeal the appellants relied on similar submissions as those made in the first appeal and further contended that the massive restructuring and extensive amendments to the

A statement of defence by the second respondent altered the defence into a completely new defence. In reply the second respondent submitted that the counterclaim was not a new cause of action and it did not change the character of the suit and that it was not statute barred. The main issue in both these appeals was whether the addition of the respective counterclaims was
B statute barred and whether the High Court judge had erred in allowing the applications for an amendment to the statement of defence.

C **Held**, dismissing both appeals with costs:

(1) The counterclaim the first respondent sought to insert into its statement of defence was based on the same facts as those pleaded in the first respondent's original statement of defence. It is settled law that a counterclaim cannot be maintained unless it is shown that the relief
D claimed is sufficiently connected with or allied to the subject matter of the principle claim as to make it necessary in the interest of justice that it should be dealt with along with the claim. In the first appeal, the first respondent's counterclaim was sufficiently connected with the subject matter of the appellants' claim to make it necessary that it should be
E dealt with along with the appellants' claim. As such, the amendment sought by the first respondent would not in effect turn the suit from one character into a suit of another and inconsistent character (see para 19).

F (2) On the issue of delay, suffice to say that delay per se did not equal prejudice or injustice. In fact, the proposed amendment was applied for to reflect the first respondent's true case against the appellants. As such the application to amend was not made mala fide. If the amendment was allowed the appellants would suffer no prejudice or harm that
G cannot be compensated by costs but if the amendment was not allowed then the first respondent would forever be shut out from receiving justice. Therefore the amendment should be allowed and the High Court judge had not erred in making an order to that effect (see paras 20 & 21).

H (3) The application to amend the second respondent's statement of defence, including the addition of the counterclaim, was based on the same facts as pleaded in the second respondent's original statement of defence. The proposed amendments were sufficiently connected to the appellants' claim to make it necessary to be dealt with along with the
I appellants' claim. As such the amendment sought in the second appeal would not turn the suit from one character into a suit of another and inconsistent character (see para 24).

(4) The second appeal was also not made mala fide and a similar finding as that made in the first appeal would apply in the second appeal with regard to the issue of delay. Therefore, the second respondent's amendment should be allowed (see para 26)

[Bahasa Malaysia summary

Responden pertama diberi kerja oleh Jabatan Kerja Raya ('JKR') untuk membangunkan dan membina empat projek kerajaan ('projek tersebut'). Responden kedua, pada masa material merupakan pengerusi eksekutif responden pertama. Memandangkan responden pertama mengalami masalah aliran wang tunai, responden kedua menghubungi Dato' Dr Nik Hussain, wakil korporat perayu pertama dan kedua ('wakil korporat'), untuk bantuan. Hasil daripada beberapa pertemuan antara responden kedua dan wakil korporat, suatu persetujuan dicapai di mana responden kedua bersetuju mengambil alih peranan responden pertama dalam projek tersebut dan dibayar RM10,260,399.48 bagi kerja-kerja yang akan ditanganinya. Juga dipersetujui bahawa pengambilalihan tersebut dikepalai oleh perayu pertama, suatu syarikat bumiputra dan responden pertama, secara umumnya masih lagi kontraktor yang dilantik bagi projek tersebut. Pada permulaannya, responden kedua telah menanggung liabiliti daripada pihak ketiga kontraktor-kontraktor dan meminta bantuan kewangan daripada perayu-perayu untuk melangsaikan hutang-hutang tersebut. Dengan pengetahuan dan persetujuan responden-responden, perayu pertama mendahulukan sejumlah RM1,200,000 untuk melangsaikan hutang-hutang tersebut. Maka perayu-perayu menanggung perbelanjaan sebanyak RM2,216,404.68 atas projek tersebut. Kemudiannya, apabila responden pertama melantik kontraktor-kontraktor untuk menggantikan perayu kedua dan/atau perayu pertama, maka menjadi hujah perayu-perayu bahawa responden-responden, melalui tindak-tanduknya, memungkiri perjanjian antara responden pertama dan perayu-perayu. Walaupun perayu-perayu menerima kemungkiran dan penamatan perjanjian tersebut, mereka menegaskan bahawa responden pertama memegang wang daripada JKR (wang daripada JKR) bagi pihak perayu kedua dan/atau pertama dan bagi tujuan-tujuan tersebut, responden pertama merupakan pemegang amanah konstruktif bagi pihak perayu-perayu atas wang daripada JKR. Apabila responden-responden menafikan dakwaan tersebut, perayu-perayu mengambil tindakan sivil terhadap responden-responden bagi suatu perintah bahawa responden pertama dan kedua bersesama dan berasingan membayar ganti rugi am kepada mereka kerana memungkiri perjanjian tersebut. Secara alternatifnya, perayu-perayu memohon suatu perintah bahawa responden-responden bersesama dan berasingan membayar jumlah pendahuluan yang diberi kepada responden-responden, iaitu, sejumlah RM2,216,404.68 yang diberi kepada responden kedua dan sejumlah

A RM1,200,000 yang diberi kepada responden pertama. Dalam tindakan sivil mereka, perayu-perayu juga menegaskan, antara lain, bahawa responden kedua telah menipu perayu-perayu dengan membuat mereka percaya bahawa wang daripada JKR tersebut akan dibayar kepada mereka. Responden pertama dan kedua memfailkan pernyataan pembelaan berasingan yang mana
B mereka menafikan liabiliti. Secara pokoknya, mereka menafikan bahawa perayu-perayu berhak ke atas wang daripada JKR itu atau responden pertama merupakan pemegang amanah konstruktif atas wang tersebut oleh sebab tiada kontrak yang boleh laksana antara perayu-perayu dan responden pertama; dan bahawa jika adapun kontrak, perayu-perayu, atas
C tindak-tanduknya, melanggar kontrak tersebut. Perayu-perayu memohon penghakiman terus terhadap responden-responden bagi sejumlah RM336,683.56 yang mana mereka dakwa telah beri kepada pemiutang-pemiutang responden pertama yang terlibat dalam projek
D tersebut dan sejumlah RM2,216,404.68, yang merupakan progress claims dibuat kepada responden atas projek tersebut. Mahkamah Tinggi memasukkan penghakiman terus terhadap responden-responden bagi sebahagian jumlah yang dituntut oleh perayu-perayu dalam permohonannya. Pada pendengaran permohonan penghakiman terus, responden pertama
E memohon untuk meminda pernyataan pembelaannya dengan menambah tuntutan balas. Walaupun permohonan untuk pindaan tersebut ditolak pada mulanya, ketika rayuan, responden pertama dibenarkan meminda pernyataan pembelaannya untuk memasukkan tuntutan balasnya. Ini merupakan rayuan perayu-perayu terhadap keputusan tersebut ('rayuan pertama'). Kemudiannya
F responden kedua juga memohon untuk meminda pernyataan pembelaannya untuk memasukkan tuntutan balas yang serupa dan permohonan ini juga dibenarkan. Perayu-perayu juga merayu terhadap keputusan tersebut ('rayuan kedua').

G Penghakiman ini berkenaan kedua-dua rayuan tersebut. Pada pendengaran rayuan pertama perayu-perayu menyatakan bahawa tuntutan balas cadangan responden pertama merupakan kausa tindakan baru dan tuntutan balas tersebut berbangkit daripada kausa tindakan yang telah melebihi had masa dan oleh itu dihalang oleh had masa. Asas rayuan perayu pertama, dalam rayuan pertama adalah bahawa hakim telah salah apabila membenarkan
H pindaan untuk memasukkan tuntutan balas cadangan yang dihalang oleh had masa dan juga kelengahan yang tak wajar dalam memfailkan permohonan untuk memasukkan tuntutan balas tersebut menunjukkan ia tidak bona fide tetapi difailkan sebagai muslihat taktikal terhadap perayu-perayu. Sebagai balasan, responden pertama menyatakan bahawa tuntutan balas tersebut
I berbangkit daripada matriks faktual yang sama dengan pembelaan yang telah difailkan dan bahawa tuntutan balas tersebut tidak dihalang oleh had masa. Dalam rayuan kedua perayu-perayu bergantung kepada penyataan-penyataan yang sama dengan rayuan pertama dan selanjutnya menyatakan bahawa penstrukturan semula dan pindaan yang sangat banyak terhadap pernyataan

pembelaan oleh responden kedua mengubah pembelaannya kepada pembelaan yang baru sepenuhnya. Sebagai balasan, responden kedua menyatakan bahawa tuntutan balas tersebut bukanlah kausa tindakan yang baru dan ia tidak mengubah sifat tindakan itu dan juga ia tidak dihalang oleh had masa. Isu utama dalam kedua-dua rayuan ini adalah sama ada tambahan dalam tuntutan balas-tuntutan balas tersebut dihalang oleh had masa dan sama ada hakim Mahkamah Tinggi silap apabila membenarkan permohonan-permohonan untuk pindaan ke atas pernyataan pembelaan.

Diputuskan, menolak kedua-dua rayuan dengan kos:

(1) Tuntutan balas yang dipohon responden pertama untuk memasukkan ke dalam pernyataan pembelaannya adalah berdasarkan fakta-fakta yang sama yang diplidkan dalam pernyataan pembelaan asal responden pertama. Sudah menjadi ketetapan perundangan bahawa suatu tuntutan balas tidak boleh didukung kecuali ditunjukkan bahawa relief yang dituntut berkaitan secukupnya atau berikat dengan hal perkara asas tuntutan menjadikannya perlu demi kepentingan keadilan bahawa perkara itu harus ditangani bersama dengan tuntutan tersebut. Dalam rayuan pertama, tuntutan balas responden pertama berkait secukupnya dengan hal perkara tuntutan perayu-perayu untuk menjadikannya perlu bahawa tuntutan balas itu harus ditangani bersama dengan tuntutan perayu-perayu. Maka, pindaan yang dipohon oleh responden pertama tidak akan mengubah tindakan tersebut kepada suatu tindakan yang berbeza sifatnya dan tidak konsisten (lihat perenggan 19).

(2) Berkenaan isu kelengahan, cukuplah dikatakan bahawa kelengahan semata-mata tidak bersamaan dengan prejudis atau ketidakadilan. Malah, pindaan cadangan tersebut dipohon untuk mencerminkan kes sebenar responden pertama terhadap perayu-perayu. Oleh itu, permohonan untuk pindaan tersebut tidak dibuat mala fide. Jika pindaan itu dibenarkan, perayu-perayu tidak akan mengalami prejudis atau kemudaratan yang tidak boleh diganti rugi dengan kos tetapi jika pindaan tersebut tidak dibenarkan, responden pertama akan selama-lamanya tidak akan mendapat keadilan. Oleh itu, pindaan tersebut harus dibenarkan dan hakim Mahkamah Tinggi tidak silap apabila memerintahkan sebegitu (lihat perenggan 20 & 21).

(3) Permohonan untuk meminda pernyataan pembelaan responden kedua, termasuk pertambahan dalam tuntutan balas, adalah berdasarkan fakta-fakta yang sama yang diplidkan dalam pernyataan pembelaan asal responden kedua. Pindaan-pindaan cadangan tersebut adalah berkait secukupnya dengan tuntutan perayu-perayu untuk menjadikannya perlu ditangani bersama dengan tuntutan perayu-perayu. Oleh itu,

A pindaan yang dipohon dalam rayuan kedua tidak akan mengubah sifat tindakan tersebut kepada suatu tindakan yang berbeza dan tidak konsisten (lihat perenggan 24).

(4) Rayuan kedua juga tidak dibuat mala fide dan keputusan yang sama seperti dalam rayuan pertama akan terpakai dalam rayuan kedua ini berkenaan dengan isu kelengahan. Oleh itu, pindaan responden kedua harus dibenarkan (perenggan 26).]]

Notes

For cases on defence, see 2(1) *Mallal's Digests* (4th Ed, 2007 Reissue) paras 5332–5367.

Cases referred to

Abdul Johari b Abdul Rahman v Lim Hou Chong [1997] 1 MLJ 629, CA (refd)
Esso Standard Malaya Bhd v Southern Cross Airways (M) Bhd [1972] 1 MLJ 168, HC (refd)
GL Bakar Ltd v Medway Building & Supplies Ltd [1958] 1 WLR 1216 (refd)
HSBC Bank Malaysia Bhd v Macquarie Technologies (M) Sdn Bhd [2004] 4 MLJ 398, CA (refd)
Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230; [1987] 1 CLJ 126, SC (refd)
Wright Norma v Overseas-Chinese Banking Corporation Ltd [1994] 1 SLR 513, CA (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd and Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Limitation Act 1939 [UK] s 28
Limitation Act 1953 ss 30(1), 31
Rules of the High Court 1980 O 15 r 1(2), O 20 r 5(1), (5)

Arthur Wang Ming Way (Aishah Fadin bte Baharudin and Neoh Hor Kee with him) (Arthur Wang Lian & Associates) for the appellant.
SS Ravichandran (Ng Chung Yee with him) (Seah Balan Ravi & Co) for the first respondent.
James Selva (Normaezah bte Ismail with him) (Ong Kok Bin & Co) for the second respondent.

Ahmad Maarop JCA:

[1] This judgment concerns two related appeals — Rayuan Sivil No W-03–179 of 2005 ('the first appeal') and Rayuan Sivil No W-03–180 of 2005 ('the second appeal'). Both appeals arose out of the suit filed by the plaintiffs (the appellants before us in both appeals) in the Civil Suit No

S1-22–538 of 2001, against the first and the second defendants (the first and the second respondents respectively before us). A

[2] The case pleaded by the appellants against the respondents in substance is as follows. Both the appellants were at all material times involved in the building and construction industry. The principal business of the first respondent at all material times was building industry. The second respondent was at all material times the executive chairman of the first respondent. Between the period from or on about 18 April 1995 to 7 May 1996, the first respondent was commissioned by the Jabatan Kerja Raya ('JKR') for the building and construction of four government projects ('the said projects'). Because the first respondent was facing cash flow problems, the second respondent sought the help of one Dato' Dr Nik Hussain Abdul Rahman ('Dato' Nik Hussain') to assist in completing the said projects. Dato' Nik Hussain was the corporate representative of the first and the second appellants. As a result of a series of meetings between the second respondent and Dato' Nik Hussain, an understanding was reached that the second appellant would effectively take over the first respondent's role in the said projects. The takeover would be fronted by the first appellant as it was a Bumiputra company. It was also agreed that to all intents and purposes, the first respondent would publicly remain as the contractor appointed for the said projects. It was also agreed that a sum of RM10,260,399.48 was to be paid to the second appellant for the works it was to undertake. The second appellant commenced works. At the outset, the second respondent was compelled by circumstance to deal with third party contractors who were originally engaged by the first respondent which had sum due and owing to them. The second appellant requested funds from the first respondent to settle the debts. However, the first respondent, through the second respondent, requested the first appellant to advance the sums on the understanding that these sums would be repaid. Consequently, and with the knowledge and consent of the first and second respondents, a sum of RM1,200,000 was advanced by the first appellant. The second appellant used the sum to settle outstanding debts to the said third party contractors. The appellants also claimed from the respondents a sum of RM2,216,404.68 which the appellants said was expended by them on the said projects. Claim for this sum was made by the appellants to the first respondent from time to time. The appellants alleged that sometime in February 1998, the first respondent appointed contractors to replace the second appellant and/or the first appellant. The appellants contended that constituted repudiation of the agreement between the first respondent and the appellants. By their solicitors' letter dated 30 April 2001, the appellants accepted the repudiation and termination of the said agreement. Further, or in the alternative, the appellants averred that the first respondent was to hold monies received from JKR for the benefit of the second and/or the first appellant and to that end, the first respondent was all material times, a constructive trustee of the

B C D E F G H I

A appellants over the said monies. The appellants prayed for an order that the first and second respondents jointly and severally pay general damages to them. Alternatively, the appellants prayed for an order that the first and second respondents jointly and severally, pay the sum of RM2,216,404.68 to the second appellant, and the sum of RM1,200,000 to the first appellant.

B

[3] As against the second respondent, the appellants averred that the second respondent had deceived them by stating that funds for the said projects coming from JKR would be paid to them, although he knew at all times that the first respondent would not be paying either of them. In the alternative,
C the appellants averred that the board of the first respondent at all times acted in concert with the second respondent and as such the first respondent had been a participant in the deception carried out by the second respondent as a joint tortfeasor. Further, or in the alternative, it was averred that the first and second respondents had conspired to injure the first and/or the second
D appellant.

[4] The first and second respondents file separate statements of the defence, in which they denied liability. Essentially they denied that the appellants were
E entitled to any monies or at all payable by the JKR or that the first respondent was a constructive trustee for such monies as alleged because:

(a) there was no enforceable contract whatsoever between the appellants and the first respondent; and

F (b) even if there was a contract the appellants had by their conduct, been in breach of the contract.

[5] In the summons in chambers dated 6 November 2002, (encl 18), the appellants applied for summary judgments against the respondents for the
G following sums:

(a) the sum of RM336,683.56 which the appellants alleged was forwarded by them to the creditors of the first respondent who were involved in the said project, and

H (b) the sum of RM2,216,404.68 for the progress claims which the appellants alleged were made to the first respondent for works carried out on the said projects.

[6] On 10 May 2004, the senior assistant registrar ('SAR') of the High
I Court entered a summary judgment against the respondents for part of the amount prayed for by the appellants in encl 18. In the summons in chambers dated 30 June 2004, (encl 38), the first respondent applied to amend its statement of defence dated 4 September 2001. In the summons in chambers dated 9 July 2004 (encl 40) the second respondent applied to amend his

statement of defence. On 27 August 2004, the learned SAR allowed the application in encl 40. The appellants appealed to the learned judge (encl 47). On 10 January 2005 the learned SAR dismissed the application in encl 38 with costs. The first respondent appealed to the learned judge (encl 52). The learned judge heard the appeals in encls 47 and 52 together. On 26 October 2005, the learned judge allowed the first respondent's appeal in encl 52 and hence the first appeal. On the same date, the learned judge dismissed the appellants' appeal in encl 47 and hence the second appeal. At the outset of the hearing before us, the appellants and the respondents agreed that both appeals be heard together, beginning with the second appeal.

THE SUBMISSIONS

The first appeal

[7] The thrust of the submission of learned counsel for the appellant was that the counterclaim of the first respondent was a new cause of action and that the counterclaim arose out of a cause of action which was statute-barred. He submitted that in its statement of defence, the first respondent pleaded that there was no privity of contract between it and the appellants. However, in the counterclaim the first respondent averred in the alternative that even if there was a contract between them, there was a breach of it. In this regard he argued that the breach occurred when the appellants stopped work and the first respondent put in their own workers. Elaborating on the counterclaim which he contended to be statute-barred, learned counsel said neither the first respondent's statement of defence nor its counterclaim specified when the alleged breach by the appellant took place. However, he said, para 15 of the appellant's statement of claim averred that the first respondent had placed its workers at the construction sites at or about February 1998, hence amounting to repudiation of the contract. Since, this was not expressly denied by the first respondent in either its statement of defence or its counterclaim, it was taken to be admitted. He contended that it was clear therefore, that cause of action on which the proposed counterclaim was made had accrued at the end of February 1998 at the latest. That, he argued, was when all material facts occurred which entitled the first respondent to sue for the remedy sought. Thus, it was submitted in his written submission that:

> according to s 6(1)(a) Limitation Act 1953, the limitation period for the proposed counterclaim would be six years as it is based on contract. As such, the limitation period would set in latest when the appellants purportedly breached the contract by abandoning the projects (which is denied) ie by the *end of February, 2004*. The proposed counterclaim was therefore time-barred at the time encl 38 was filed.
>
> *The learned judge erroneously allowed the amendment inserting the time-barred proposed counterclaim*

A The appellants submit that as the proposed counterclaim was time-barred, the only way that it could be allowed is if the first respondent fulfilled both the requirements of O 20 r 5(5) of the RHC:

(a) that the new cause of action must arise from the same facts or
B substantially the same facts as an existing cause of action; and

(b) that the party seeking for leave to amend (ie the first respondent) *must have already pleaded an existing cause of action and sought relief from such cause of action.*

C In the present case, the appellants submit that the first respondent's proposed counterclaim fails to fulfil the second requirement of O 20 r 5(5) as the first respondent did not have a pleaded cause of action against the appellants prior to its application in encl 38. No counterclaim was pleaded against the appellants in the first respondent's statement of defence, a fact expressly
D acknowledged by the learned judge (record of appeal, p 22).

Therefore, there existed no basis for the amendment inserting the proposed counterclaim that was clearly time-barred by the time the first respondent filed encl 38. The learned judge failed to appreciate this fact, preferring to merely state that the proposed counterclaim was in accordance with the
E principles laid down in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd* [1983] 1 MLJ 213. His Lordship did not refer to the applicable legal provisions in the RHC and/or the LA 1953.

In this regard it was contended that s 31 of the Limitation Act 1953 had no
F impact upon the provision under O 20 r 5(5) of the Rules of High Court 1980 ('RHC').

[8] The other point raised on behalf of the appellant was that these was an ordinate delay in filing encl 38 and it was not bona fide but was a
G contumelious afterthought. The counterclaim was filed as a tactical manoeuvre to deprive the appellants of the fruits of their successful application for summary judgment. It was also argued that the appellants would suffer prejudice that would be irremediable by costs.

H

[9] In reply, learned counsel for the first respondent submitted that the counterclaim arose from the same factual matrix based upon which the statement of defence was filed. It concerned the said projects which were abandoned by the appellants, and which the first respondent had to take over
I and employ new sub contractors resulting in increased costs being incurred by them. It was also contended that the counterclaim was not statute-barred. In this regard, learned counsel for the first respondent submitted that the appellants were relying on the assumption that the counterclaim was statute barred when in fact there was a dispute as to the date when the first

respondent took over the said projects.

The second appeal

[10] Essentially, in this appeal, in contending that the second respondent's counterclaim was statute-barred, the appellants relied on submission similar to that which they made in the first appeal. It was also contended by the learned counsel for the appellants that in encl 40 the second respondent actually made massive restructuring of its statement of defence and added a counterclaim with new causes of action. Learned counsel submitted that 'the massive amendments from top to bottom of the defence radically change the nature of the second respondent's statement of defence, purportedly to provide a foundation for its proposed counterclaim. This in turn effectively changed the second respondent defence into another of inconsistent character. In fact, from the extensive amendments made, the amended/defence was a completely new defence! Such amendments should not be permitted.

[11] In reply, the substance of the submission made by learned counsel for second respondent was that the second's respondent's counterclaim was not a new cause of action and it did not change the character of the suit as it was based on the same facts and arose out of the same transaction as the original statement of defence. Relying on s 31 of the Limitation Act 1953, it was contended that the counterclaim was not statute-barred. Learned counsel also submitted that O 20 r 5(5) of the RHC was not relevant to the proceeding before the court.

DECISION

[12] It appears to us that the real complaint of the appellants in both the appeals is the addition of the respective counterclaims which the appellants contended were statute-barred and that s 31 of the Limitation Act 1953 had no application to the amendment sought by the respondents. For reasons which we will explain shortly, we cannot accept the submission made on behalf of the appellants. Under O 15 r (2) of the RHC, a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter and where he does so he must add the counterclaim to his defence. So he has a choice. He can bring a separate action or make a counterclaim. If he makes a counterclaim how do we determine whether it is statute-barred? We feel that this is where the

Limitation Act 1953 comes into play. We do not agree that s 31 of the Limitation Act 1953 do not apply to this proceeding. Section 30(1) of the Act provides:

> *This* Act and any other written law relating to the limitation of actions *shall apply to arbitrations as they apply to actions.*

So, s 31 of the Limitation Act 1953 is relevant and reference must be made to it. That provision is similar to s 28 of the English Limitation Act 1939. The annotation to this section in 19 *Halsbury's Statutes* (3rd Ed) at p 89 is as follows:

> The effect of this section is that, if this Act is pleaded to a defence of set-off or a counterclaim, the plaintiff, in order to establish his plea, must prove that the set-off or counterclaim was barred when he himself commenced his action and it is not enough to prove that it was barred at the time when it was pleaded.

[13] Since the appellants had raised the issue of the counterclaim being barred by the Limitation Act 1953, under s 31 of the Act, they must prove that the counterclaim was barred when they commenced their action (25 June 2001). Going by what was pleaded in the statement of claim that the cause of action had arisen at the end of February 1998, the counterclaim of the first respondent was not barred by the Act. Similarly, as will be clear later in this judgment, the cause of action relevant to the second respondent's counterclaim also had arisen at the end of February 1998. Thus, his counterclaim was also not barred by the Act. Since their counterclaims were not barred by the Limitation Act 1953, the respondent do not need to resort to O 20 r 5(5) of the RHC. In our view, in the circumstances of the present appeals, in order to persuade the court to exercise its discretion under O 20 r 5(1) of the RHC, the respondents need only satisfy the court the following, namely; (1) that their applications are bona fide; (2) the prejudice caused to the appellants can be compensated by costs; and (3) the amendments in encls 38 and 40 respectively, would not in effect turn the suit from one character into a suit of another inconsistent character (see *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd and Ors* [1983] 1 MLJ 213 (FC)). *Yamaha Motor* as well as other familiar decisions on the subject of amendment of pleadings under O 20 of the RHC were referred to by this court in *Abdul Johari b Abdul Rahman v Lim Hou Chong* [1997] 1 MLJ 629. In delivering the judgment of the court, Abdul Malek Ahmad JCA (as he then was) said:

> *The authorities strongly indicate that the courts should lean towards granting application for amendments even when a new cause of action or line of defence is raised, provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments*. On these considerations, we agree with the learned judge that as far as the amendments were concerned, there is no basic departure from the original pleadings which were grounded on the principles of equity.

[14] We now turn to consider the amendments applied for in encls 38 and 40. A

ENCLOSURE 38

B

[15] Earlier in this judgment, we have set out in substance the case pleaded by the appellants. Three basic facts form the thrust of the appellants cause of action. The first is the commissioning of the first respondent by the JKR to carry out the said projects. The second is the meetings between the second respondent and Dato' Nik Hussain. The third is that at the material times, C the first respondent was facing cash flow problem. To reiterate, the appellants averred that arising from the series of meeting between the second respondent (the executive chairman of the first respondent), and Dato' Nik Hussain, agreement was reached, whereby the second appellant would affectively take over the first respondent's role in the said projects, the take over would be D fronted by the first appellant as it was a Bumiputera company, the first respondent would, for all intents and purposes, remain publicly as the contractor appointed for the said projects, and that the appellants would be repaid out of the proceed received from the JKR. We observe that in its E pleaded case, unlike the first respondent, the appellants did not make any specific reference to the role played by MTD CAPITAL BHD ('MTD'). This brings us to the first respondent's case as pleaded in its original statement of defence. The three basic facts forming the thrust of the appellants' case, were not disputed by the first respondent. In their original statement of defence, F the first respondent admitted that there were several meetings between the second respondent and Dato' Nik Hussain, the then executive chairman of MTD, who was also the second respondent's friend, but denied that arising from the said meeting, agreement was reached between the appellants and the first respondent. The first respondent contended their dealing and agreement G was with MTD and that the appellants were sub contractors or agents of MTD. In this regard, the first respondent explained that the purpose of the meetings was to get Dato' Nik Hussain/MTD to assist the first respondent which was then cash strapped and unable to complete three of the said projects. According to the first respondent, in the discussion between them, H although, the first respondent (through the second respondent) sought Dato' Nik Hussain's assistance as executive chairman of MTD, to fund the first respondent to complete the said projects, option was also extended to Dato' Nik Hussain that if MTD desired, it could acquire the entire share capital of the first respondent. Dato' Nik Hussain expressed great interest and would I explore the possibility of an acquisition by MTD. Dato' Nik Hussain also agreed to render immediate help to the first respondent to complete the ongoing projects. In the meetings it was also decided that sub contractors would be appointed by Dato' Nik Hussain to assist in completing the projects

A and ultimately MTD would be responsible to the sub contractors in the light of the proposal to acquire the equity of the first respondent.

[16] The first respondent averred that later, the second appellant requested the first respondent to hand over the contract documents of the uncompleted
B projects, which was duly acceded to by the first respondent. The second appellant was a sub contractor appointed by MTD to assist the first respondent to complete the projects. Later still, in late September 1997, several persons purporting to be representatives of the second appellant
C moved into various project sites and directed all existing sub contractors to immediately stop the works which were in progress. The first respondent's employees and its several sub contractors on the sites were informed that new sub contractors would take over shortly.

D **[17]** Although the discussion with Dato' Dr Nik was to seek the assistance of MTD to fund the first respondent's ongoing projects, monies were due to the suppliers and sub contractors who were already working on the sites. Their services were terminated by the MTD's agent who arrived at the sites and this made it imperative that all payments due to the said suppliers and
E sub contractors be made promptly. An estimate of this payments was sent to MTD. MTD notified the second respondent that another subsidiary of MTD would be advancing the payments and for the first time reference was made to the first appellant. On MTD's directions, a list of the first respondent's immediate requirements were forwarded to the first appellant.
F The first respondent denied any knowledge of the advance of RM1,200,000 from the first appellant to the second appellant and that sum was used by the second appellant to settle outstanding debts to the contractors. The first respondent admitted that works commenced at the site, but averred that the first appellant was not informed whether it was a sub contractor or worker
G employed by the second appellant as agents of MTD. The first appellant was also not informed as to who would be responsible for their payment.

[18] On 12 December 1997 the first respondent received progress claims from the second appellant which the first respondent contended did not
H commensurate with the work carried out by the workers who had come on the sites, and that much of the work included in the claims had been completed by the previous sub contractors, and the second appellant had improperly included these items of work as having been undertaken and completed by them. In January 1998, the second appellant again made
I further progress claims which the first respondent objected. Thereafter, it became apparent that the second appellant was no longer interested in carrying on with the work. The second appellant indicated that unless progress payments were made, it would be compelled to stop work completely. The second respondent approached MTD to resolve the matter.

Nevertheless, all work thereafter completely ceased. The first respondent averred that upon sudden cessation of work at the site, it was compelled to obtain assistance of another sub contractor to complete the contracts which was by then mostly overdue. Owing to sudden cessation of the work by MTD's agents, the JKR terminated the contract on the Sekolah Rendah Pendidikan Khas which was one of the said projects. The first respondent then concluded its defence denying that the appellants were entitled to any monies or at all payable by the JKR or that the first respondent was constructive trustee for such monies as alleged because:

(a) there was no enforceable contract whatsoever between the appellants and the first respondent, and

(b) even if there was a contract, the appellants had been in breach of the contract and had, by such breach forfeited all right to any claim for these monies or at all.

[19] So, the alternative plea that there was no contract and if there was one, the appellants had breached it, was already part of the first respondent's original statement of defence. In its counterclaim, the first respondent repeated what he had alleged in the original statement of defence. Then, relying and following through on the plea that even if there was a contract between it and the appellants, the appellants were in breach of that contract, in the counterclaim, the first respondent averred that the breach of contract by the appellants (by suddenly abandoning the contract works), had caused it to suffer costs and damages in that it had to pay liquidated damages and other expenses on account of the delay caused by the breach, as well as cost overruns relating to the said projects. So, clearly, the counterclaim added by application in encl 38 was based on the same facts as pleaded in the original statement of defence of the first respondent. In this connection, reference must be made again to O 15 r 1(2) of the RHC which allows a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and howsoever arising), instead of bringing a separate action, to make a counterclaim in respect of that matter and where he does so he must add the counterclaim to his defence. However, it is settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principle claim as to make it necessary in the interest of justice that it should be dealt with along with the claim. Thus a counterclaim for slander cannot be maintained in a claim for money lent (see *Esso Standard Malaya Bhd v Southern Cross Airways (M) Bhd* [1972] 1 MLJ 168 at p 170, per Raja Azlan Shah J as His Royal Highness then was)). In the present appeal from what we have demonstrated thus far, the first respondent's counterclaim is sufficiently connected with the subject matter of the appellants' claim to make it necessary that it should be dealt with along with the appellants' claim. We are satisfied that the

amendment sought by the first respondent in encl 38 would not in effect turn the suit from one character into a suit of another and inconsistent character.

[20] On the issue of delay, it was submitted by learned counsel for the appellants that there was no explanation for the delay of nearly three years in the filing of encl 38 which was done after the SAR had entered summary judgment for the appellants, though for only part of its claim. Thus, it was contended on behalf of the appellants that the application in encl 38 was not bona fide but represented a contumelious afterthought and was filed as a tactical maneuver to deprive the appellants of the fruits of their successful application for summary judgment. We do not think so. While the time at which an amendment is made is a relevant consideration it is not necessarily decisive. Delay per se does not equal prejudice or injustice (see *HSBC Bank Malaysia Bhd v Macquarie Technologies (M) Sdn Bhd* [2004] 4 MLJ 398, *Wright Norma v Overseas-Chinese Banking Corporation Ltd* [1994] 1 SLR 513). In its affidavit in reply, the first respondent explained that the SAR entered the summary judgment only for the sum of RM427,420.10 and that the SAR held that the respondent had successfully raised triable issues which should be tried in respect of the rest of the appellants' claim. Therefore the amendment in encl 38 was applied for to reflect the true case of the first respondent's against the appellant.

[21] We are not convinced that the application in encl 38 was made mala fide. In the present appeal we are satisfied that by allowing the first respondent's application in encl 38, the appellant will suffer no prejudice or harm that cannot be compensated by a suitable order as to costs. On the other hand, we have to consider the position of the first respondent. Its counterclaim may or may not succeed. In this proceeding we are not concerned with the merit of the first respondent's case. However, if the amendment is not allowed, the first respondent will forever be shut out from its opportunity at receiving justice. On balance, we feel that the amendment should be allowed. We therefore hold that the learned judge of the High Court did not err in making the order which had the effect of allowing encl 38.

[22] In the result the appeal is dismissed with costs.

ENCLOSURE 40

[23] In his original statement of defence, the second respondent pleaded facts and defence which were similar to that pleaded in the first respondent's statement of defence. Just as in the case of the first respondent, the three basic facts which form the thrust of the appellants' case were not disputed by the second respondent. So, what we have said in paras 15, 16, 17 and 18 of this

judgment also apply mutatis mutandi to the second appellant. Like the first respondent, the second respondent averred that upon sudden cessation of work at the sites, the first respondent was compelled to obtain assistance of another sub contractor to complete the contracts which was by then mostly overdue. Owing to sudden cessation of the work by MTD's agents, the JKR terminated the contract on the Sekolah Rendah Pendidikan Khas which was one of the said projects. The second respondent then concluded its defence denying that the appellants were entitled to any monies or at all payable by the JKR or that the first respondent was constructive trustee for such monies as alleged because:

(a) there was no enforceable contract whatsoever between the appellants and the first respondent, and

(b) even if there was a contract, the appellants had been in breach of the contract.

[24] Like the first appellant, the alternative plea that there was no contract and that if there was one, the appellants had breached it, was already part of the second respondent's original statement of defence. Relying and following through on the plea that even if there was a contract between the first respondent and the appellants, the first appellants were in breach of that contract, in his counterclaim, the second respondent averred that the breach of contract by the appellants had caused him to suffer loss and damages in the form of loss of investment in the first respondent amounting to RM2,400,000 and loss of allowance of RM4,000 a month from January 2003 to October 2013. How the said loss and damages came about were set out in the amendment applied for in encl 40, particularly paras 13G–13K of the amended statement of defence. It is clear to us that the amendment in encl 40 including the counterclaim was actually based on the same facts as pleaded in the second respondent's original statement of defence. It is also clear to us that the second respondent's counterclaim is sufficiently connected with the subject matter of the appellants' claim so as to make it necessary that it should be dealt with along with the appellants' claim. We conclude that the amendment sought by the second respondent in encl 40 would not in effect turn the suit from one character into a suit of another and inconsistent character.

[25] On the issue of delay, learned counsel for the appellant submitted similar point which he raised in respect of the first appeal. He contended that the second respondent was aware of the facts which would allow him to counterclaim against the appellant from the day it received the statement of claim, but he chose to wait until the very last moment to apply for amendment. This, he submitted coupled with the lack of explanation for the delay showed that encl 40 was a contumelious afterthought and was not made

bone fide. We do not agree. In his affidavit in reply to the appellants' affidavit in opposing encl 40, the second respondent's explanation's for the delay was that his former solicitors did not advise him as to the counterclaim he could make against the appellants. In this regard, in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230; [1987] 1 CLJ 126, the Supreme Court said:

As for the general principles for the granting of leave to amend:–

> It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made 'for the purpose of determining real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings' (see per Jenkins LJ in *GL Bakar Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216, at p 1231; [1958] 3 All ER 540, at p 546).
>
> It is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right' (per Bowen LJ in *Cropper v Smith* (1883) 26 Ch D 700, pp 710–722, with which observations AL Smith LJ expressed 'emphatic agreement' in *Shoe Machinery Co v Cultam* [1896] 1 Ch 108, at p 112).

[26] Like what we said in respect of encl 38, we are not convinced that the application in encl 40 was made mala fide. In the present appeal we are satisfied that by allowing the first respondent's application in encl 40, the appellant will suffer no prejudice or harm that cannot be compensated by a suitable order as to costs. On the other hand, we have to consider the position of the second respondent. His counterclaim may or may not succeed. In this proceeding we are not concerned with the merit of the second respondent's case. However, if the amendment is not allowed, the second respondent will forever be shut out from its opportunity at receiving justice. On balance, we feel that the amendment should be allowed. We therefore hold that the learned judge of the High Court did not err in making the order which had the effect of allowing encl 40.

[27] In the result the second appeal is dismissed with costs.

Appeals dismissed with costs.

Reported by K Nesan